# No. 10,384

IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

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BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

*Appellant,*

vs.

CLIFFORD C. ANGLIM, United States Collector of Internal Revenue for the First Collection District of California,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

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*Appellee.*

## APPELLANT'S OPENING BRIEF.

### JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division. The only opinion rendered by the Court below appears in the record herein at page 32.

Appellant is a national banking association organized and existing under and by virtue of the laws of the United States of America and has its principal place of business in the City and County of San Francisco, California. The causes of action herein are for the recovery of income taxes erroneously and illegally

collected from appellant as withholding agent under Section 143 of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code (R. 4, 7). Written claims for refund were filed with the appellee as Collector of Internal Revenue (R. 5, 8) which claims were rejected by the Commissioner of Internal Revenue (R. 6, 9). This action for the recovery of said taxes was brought in the District Court pursuant to the provisions of Section 24 of the Judicial Code, United States Code, Title 28, Section 41(5). The matter came to trial before the District Court and the judgment of that Court was entered on November 6, 1942 (R. 43). On February 2, 1943, under authority of Section 128 of the Judicial Code, United States Code, Title 28, Section 225, appeal was taken to this Court to review the judgment of the Court below (R. 44). This appeal and the transcript of record were filed and docketed in this Court on March 10, 1943 (R. 52).

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**STATEMENT OF THE CASE.**

The facts in this appeal are not in dispute and are admitted by the pleadings or found by the Court in its findings of fact. The complaint alleged three causes of action, the first two of which were decided in favor of appellee and are involved in this appeal. The two causes of action present identical issues but involve different years. The facts may be summarized as follows:

(1) Appellant is a national banking association organized and existing under and by virtue of the laws

of the United States of America, and has its principal place of business in the City and County of San Francisco, State of California (R. 34).

(2) At all times material hereto, appellee was the United States Collector of Internal Revenue for the First Internal Revenue Collection District of the State of California, and a resident of the Northern District of California (R. 34).

(3) At all times material hereto, appellant was the transfer agent of Transamerica Corporation, and as such transfer agent had the control, custody, disposal or payment of dividends, declared by said Transamerica Corporation to the stockholders of said corporation (R. 34).

(4) During the years 1938 and 1939 appellant, as transfer agent for Transamerica Corporation, distributed dividends declared by said corporation to its stockholders. Among the stockholders of Transamerica Corporation were certain non-resident aliens. Appellant assumed that it was required to withhold income taxes from the distributions to non-resident aliens by the provisions of Section 143(b) and (c) of the Revenue Act of 1938, and Section 143(b) and (c) of the Internal Revenue Code (R. 36, 38) and withheld $3189.83 from the dividends distributed to the non-resident alien stockholders of Transamerica Corporation in 1938 (R. 36) and withheld $3227.46 from the dividends distributed to the non-resident alien stockholders of Transamerica Corporation in 1939 (R. 38).

(5) Appellant filed withholding tax returns on Treasury Department form 1042 for the years 1938

and 1939 on March 15, 1939 and March 15, 1940, respectively and included therein the dividends paid by Transamerica Corporation to non-resident aliens during the year 1938 and 1939 (R. 35, 37). Appellant also reported in said returns the amounts of tax which it was withholding from said non-resident alien individuals. The taxes withheld by appellant corporation during the year 1938 including the sum of $3189.83 withheld from the non-resident alien stockholders of Transamerica Corporation were paid to appellee as Collector of Internal Revenue on or about June 15, 1939 (R. 35). The taxes withheld by appellant corporation during the year 1939 including the sum of $3227.46 withheld from the non-resident alien stockholders of Transamerica Corporation were paid to appellee as Collector of Internal Revenue on or about June 15, 1940 (R. 37).

(6) On or about January 31, 1941 the Commissioner of Internal Revenue ruled that dividends paid by Transamerica Corporation during the years 1938 and 1939 did not constitute dividend income to its stockholders (R. 36; Complaint R. 7 and 8; Admitted by Answer R. 26 and 27).

(7) On or about July 26, 1941, appellant duly filed claims for refund for the taxes withheld and paid to appellee as aforesaid for the year 1938 in the amount of $3189.83 and for the taxes withheld and paid to appellee for the year 1939 in the amount of $3227.46. In said claims for refund appellant alleged as the basis the same grounds and facts relied upon in this proceeding. There were attached to said refund claim lists

containing the names of approximately 1000 non-resident alien individuals and these lists showed the name and address of each individual, the total amount of the Transamerica dividend payable to each individual, and the amount of tax which had been withheld from each individual for the refund of which the claim was being filed (R. 36, 38). On November 25, 1941, the Deputy Commissioner of Internal Revenue advised appellant by letter that its claims for refund would be rejected for the reason

> "As the tax involved was actually withheld by you from the income paid to the non-resident foreign persons, any excess amounts withheld are refundable only to those recipients upon showing that the amounts withheld were in excess of any tax properly due for the taxable year. For this reason your claims will be rejected." (R. 16, 37 and 38.)

Said claims for refund were officially rejected by the Commissioner of Internal Revenue on December 17, 1941 (R. 36 and 37).

(8) No part of said $3189.83 and said $3227.46 collected from appellant by appellee as aforesaid was repaid or refunded (R. 37 and 38).

(9) The appellant withheld taxes from non-resident aliens on dividends paid on Transamerica Corporation stock in the year 1937, and filed claim for refund of these taxes, which claim was in form and substance similar to the claims filed for the years 1938 and 1939 hereinbefore described. The Commissioner of Internal Revenue allowed this claim and made a

refund of the tax to the appellant. Upon receipt of the refund the appellant paid the amounts as shown in the claim to those stockholders to whom checks could be transmitted, and appellant actually credited the deposit account of each stockholder to whom checks could not be transmitted, and these credits appear as deposit liabilities on the books of the appellant bank (R. 39).

(10) After the appellant bank filed the said refund claims for the years 1938 and 1939, it set up on its records what it designates as "Memorandum Credit Cards", showing as to each person listed on the said refund claims a credit for the amount of the tax for which refund was being claimed for his account. This credit was set up by the appellant only on subsidiary card records and is considered by the appellant as a contingent credit which would be transferred to the actual liability accounts of the bank when and if the refund claim is finally allowed by the Government, it being the purpose and intention of the appellant bank to handle any refund of the 1938 and 1939 taxes in the same manner in which it handled the refund received for the 1937 tax (R. 39).

(11) Appellant filed its complaint for the recovery of the above taxes, which complaint set forth two causes of action based upon the aforementioned claims for refund. Said complaint included a third cause of action which is not involved in this appeal (R. 29).

(12) Upon the above facts, which were found in the findings of fact (R. 33-40), the District Court concluded that appellant had no right or authority under

the laws of the United States to maintain the actions alleged in the first and second causes of action herein (R. 40-41). Judgment was rendered for appellee on the first and second causes of action and for appellant on the third cause of action (R. 43-44).

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**SPECIFICATION OF ERRORS.**

Appellant relies upon the following errors committed by the District Court:

(1) The District Court erred as a matter of law in determining that appellant was not authorized under the law to maintain this action for the recovery of income taxes withheld by appellant as withholding agent from non-resident alien individuals and paid to appellee from payments which did not constitute taxable income to the non-resident aliens.

(2) The District Court erred as a matter of law in determining that a withholding agent is not authorized to maintain an action for the recovery of income taxes erroneously withheld from payments to non-resident aliens and paid to the Collector of Internal Revenue.

(3) The District Court erred in failing and refusing to hold that appellant was entitled to the refund of the taxes paid to defendant.

(4) The District Court erred as a matter of law in rendering judgment against appellant on the first and second causes of action herein.

## ISSUE PRESENTED.

Whether a withholding agent may recover an admitted overpayment of income taxes which it withheld and paid to the Collector of Internal Revenue, in an action against the collector to whom the taxes were paid.

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## STATUTES INVOLVED.

The pertinent portions of Sections 143 and 322 of the Revenue Act of 1938, and the Internal Revenue Code, are set forth in the appendix hereto.

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## SUMMARY OF ARGUMENT.

(1) The taxes here involved were admittedly overpaid. Appellant, being the taxpayer who was liable for and who paid the taxes and having complied with all the procedural requirements, is entitled to judgment for the amount of the overpayment against appellee, the Collector of Internal Revenue, to whom the taxes were paid.

(2) The provisions of Section 143(f) of the Internal Revenue Code have no application to an action against a Collector of Internal Revenue for the recovery of taxes overpaid.

(3) In any event, Section 143(f) of the Internal Revenue Code does not restrict recovery in this case because the purpose of that section has been fully complied with.

## ARGUMENT.

### I.

### INTRODUCTORY STATEMENT.

As set forth in the statement of facts, this action is for the recovery of income taxes which appellant withheld from dividends of Transamerica Corporation payable to certain non-resident aliens and which appellant paid to appellee as provided in Section 143 of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code. It was later determined that said dividends were not taxable income to the stockholders of Transamerica Corporation and that no tax was payable thereon. Appellant filed claims for refund for the overpayments and upon rejection of the claims brought this action in the District Court.

The taxes in question were not imposed upon appellant's income and appellant has no financial interest in any recovery which it might make. Appellant has no intention of retaining any sums recovered and will immediately upon receipt of the refund pay over the entire recovery to the stockholders from whom the tax was withheld.

Appellant's only interest in this action is the protection of the interests of the individuals who due to circumstances beyond their control are unable to protect their interests. Appellant is also convinced that it is the proper party to maintain this action to recover the overpayments and that it has a moral if not a legal duty to the individuals concerned to take the necessary action to protect their interests.

## II.

### THE OVERPAYMENTS ARE ADMITTED.

There is no dispute between the parties with regard to the fact that the taxes here involved were overpaid. At the time the dividends were paid by Transamerica Corporation and distributed by appellant it was not known whether they constituted income to the stockholder recipients. Appellant assumed that it was required by Section 143(b) and (c) of the Revenue Act of 1938 and Section 143 of the Internal Revenue Code to withhold the tax. Appellant did withhold the taxes and paid them to appellee as Collector of Internal Revenue. On or about January 31, 1941 the Commissioner of Internal Revenue determined that the dividends paid by Transamerica Corporation in the years 1938 and 1939 did not constitute dividend income to the stockholders (R. 36).

As soon as appellant learned that said dividends paid in 1938 and 1939 did not constitute taxable income, it filed claims for refund for the tax of $3189.83 withheld and paid to appellee on the dividends paid in 1938 and for the tax of $3227.46 withheld and paid to appellee upon the dividends paid in 1939. The claims for refund were rejected by the Commissioner of Internal Revenue on the ground that since appellant had withheld the taxes any sums refundable were payable only to the non-resident alien stockholders of Transamerica Corporation (R. 37, 38).

This action was then commenced in the District Court for the recovery of said taxes. The District Court gave judgment for appellee and based its judg-

ment upon the conclusions that appellant was not the proper party to recover said taxes. Neither appellee nor the Commissioner of Internal Revenue has questioned the fact that said taxes were erroneously paid and were refundable to the proper party. The Court below expressly found that the Commissioner determined that the dividends paid by Transamerica Corporation in 1938 and 1939 did not constitute dividend income (R. 36) and it necessarily follows that no taxes were payable thereon. Since the taxes in question were admittedly overpaid, if appellant is authorized under the law to maintain this action, it is entitled to judgment.

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## III.

### APPELLANT IS THE PROPER PARTY TO RECOVER THE TAXES.

This action is not against the United States or against the Commissioner of Internal Revenue but solely against appellee who is the Collector of Internal Revenue who collected the taxes in question. It has long been recognized that a taxpayer who has overpaid internal revenue taxes may bring an action against the Collector of Internal Revenue to whom the taxes were paid. Such an action is a personal action at common law in the nature of assumpsit, and is not an action against the United States.

*United States v. Kales* (1941), 314 U. S. 186;
*Sage v. United States* (1919), 250 U. S. 33;
*United States v. Nunnally Investment Co.* (1942), 316 U. S. 258.

**All of the requirements of law have been complied with.**

There are certain requirements which must be complied with in an action against the Collector but they have all been met in this action.

Appellant paid the taxes in question to appellee (R. 36, 38) and is the taxpayer. Section 143(c) of the Revenue Act of 1938 and Section 143(c) of the Internal Revenue Code expressly made the person required to deduct and withhold a tax liable for such tax. Section 901(a)(14) of the Revenue Act of 1938 defined "taxpayer" as follows: "The term 'taxpayer' means any person subject to a tax imposed by this Act." See also Section 3797(a)(14) of Internal Revenue Code. In *Houston Street Corporation v. Commissioner* (CCA 5, 1936), 84 F. (2d) 821, the Court stated that there was no distinction between "liable for such tax" and "subject to a tax" and concluded that a withholding agent was the taxpayer with respect to the sums required to be withheld from payments to nonresident aliens.

Section 3772 of the Internal Revenue Code provides that no suit or proceeding shall be maintained in any Court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed and collected until a claim for refund or credit has been duly filed with the Commissioner as provided by law and the regulations. It is also provided that such suit must be commenced within two years after the rejection of such claim.

It is admitted by the pleadings herein and expressly found by the Court below that appellant filed claims

for refund of the taxes in question as required by the law and the regulations and set forth therein the same facts and grounds herein relied upon (Complaint Para. IX R. 5, admitted by Answer Para. V R. 24 and 25; Findings of Fact R. 36; Complaint Para. VI second cause of action R. 8, admitted by Answer R. 27; Findings of Fact R. 38). The claims for refund were rejected by the Commissioner of Internal Revenue on December 17, 1941 (R. 37, 38). This action was commenced on July 2, 1942 (R. 23).

Since it is admitted that the payments from which the taxes were withheld were not taxable income it follows that the taxes in question were illegally assessed and collected. Since appellant has complied with all the requirements of law for the recovery of said taxes it is submitted that judgment should have been rendered for appellant.

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## IV.

### JUDGMENT OF DISTRICT COURT BASED UPON ERRONEOUS GROUNDS.

The Court below based its judgment upon the ground that appellant was not the proper party to maintain this action and recover the taxes in question. This conclusion was based upon the further conclusion that the United States Government can be sued only with its consent and it has not consented to be sued by a withholding agent.

The Court's premise that this action is against the United States is erroneous. This action is a personal

action against appellee and the United States is a stranger to the action. The fact that the United States may assume the payment of a judgment rendered does not make it a party to the action or give it an interest in the action at this stage of the proceedings.

The United States Supreme Court has several times considered the question of whether an action against a Collector of Internal Revenue is an action against the United States and has consistently held that the United States is not a party to such action. In the recent case, *United States v. Kales* (1941), 314 U. S. 186, the Court held that judgment in an action against the Collector did not bar a later suit against the United States to recover taxes paid for the same year to a different Collector.

In the opinion which was written by Chief Justice Stone, the Court stated, pages 199-200:

> "* * * The judgment against the Collector is a personal judgment, to which the United States is a stranger except as it has obligated itself to pay it. (Citations omitted).
>
> While the statutes have for most practical purposes reduced the personal liability of the collector to a fiction, the course of the legislation indicates clearly enough that it is a fiction intended to be acted upon to the extent that the right to maintain the suit and its incidents, until judgment rendered, are to be left undisturbed, Among its incidents is the right to a jury trial, which is not available in suits against the United States. 28 U. S. C. Section 41(20)."

In *Sage v. United States* (1919), 250 U. S. 33, 39 Sup. Ct. 415, the Court stated:

> "* * * But no one could contend that technically a judgment of a District Court in a suit against a collector was a judgment against or in favor of the United States. It is hard to say that the United States is privy to such a judgment or that it would be bound by it if a suit were brought in the Court of Claims. The suit is personal and its incidents, such as the nature of the defenses open and the allowance of interest are different. It does not concern property in which the United States asserts an interest on its own behalf or as trustee, as in *Minnesota v. Hitchcock,* 185 U.S. 373. At the time the judgment is entered the United States is a stranger. Subsequently the discretionary action of officials may, or it may not give the United States a practical interest in the amount of the judgment, as determining the amount of a claim against it, but the claim would arise from the subsequent official act, not from the judgment itself."

See also

*Smietanka v. Indiana Steel Co.* (1921), 257 U.S. 1, 42 Sup. Ct. 1;

*United States v. Nunnally Investment Co.* (1942), 316 U.S. 258.

Since the United States is not a party to this action but is in fact a stranger thereto, it follows that the consent of the United States is not essential to the maintenance of the action. The United States may and has prescribed certain procedural requirements, but as pointed out above, all the procedural requirements have admittedly been complied with.

Appellant submits that the District Court erred in concluding that this action could be maintained only with the consent or permission of the United States and that the statutes do not permit the maintenance of this action.

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## V.

### SECTION 143(f) OF THE INTERNAL REVENUE CODE DOES NOT FORBID RECOVERY BY APPELLANT.

While the Court below did not expressly so state, it appears that its conclusions that appellant could not recover were based upon Section 143(f) of the Internal Revenue Code which reads as follows:

> "(f) Refunds and Credits.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent."

It is to be noted that Section 143(f) expressly refers to refunds and credits authorized by Section 322 of the Code. Section 322 refers exclusively to refunds and credits which can be made by the Commissioner of Internal Revenue upon his own determination; or upon the determination of the Board of Tax Appeals (now the Tax Court of the United States). Said section does not authorize payment of judgments or make any reference thereto. If appellant is granted judgment in this action and said judgment is satisfied by the United States, the payment of said judgment would not be by authority granted by Section 322

but by authority granted by Section 989 of the Revised Statutes which reads as follows:

> "Sec. 989. When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury."

Section 143(f) makes no reference either directly or by inference to Section 989 of the Revised Statutes or to payments of judgments pursuant thereto.

Appellant respectfully submits that Section 143(f) has no bearing upon appellant's right to recover in this action and in no way restricts or limits the right of appellant to recover judgment against appellee.

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## VI.

### THE PRINCIPLE OF SECTION 143(f) HAS BEEN COMPLIED WITH.

Even if Section 143(f) did have application to this action it is believed that said section would not prevent recovery by appellant in that the principle of said section has been complied with.

In authorizing and directing the refund of overpayments to withholding agents, Section 143(f) recognizes a withholding agent as the taxpayer, and recognizes the right of a withholding agent to file a claim for refund as provided in Section 322. The restriction against payment of the refund to a withholding agent when the tax was actually withheld by the withholding agent was undoubtedly intended to prevent such agent from recovering twice, once from the persons from whom the taxes were withheld and again from the Government, see *Capital Estates, Inc. v. Commissioner,* 46 B.T.A. 986. Or perhaps to prevent another recovery from the government by the individual non-resident aliens concerned. *Pauker v. U. S.,* 23 F. Supp. 821. If the tax was not withheld or if the withholding agent withheld but later reimbursed or committed itself to reimburse the persons from whom the tax was withheld the situation is the same as though there had been no withholding and the restriction contained in 143(f) serves no purpose.

In the present case appellant did withhold the tax but has definitely committed itself to pay over to the non-resident aliens any sums recovered in this action. Appellant has set up contingent credits for the benefit of the persons from whom the tax was withheld and intends to pay over to such persons any sums recovered (R. 39). The good faith of appellant is established by its declarations to that effect both before the Court below and to this Court and by the fact that it did pay over to the individuals concerned the 1937 income taxes similarly withheld but which

were refunded to appellant by the Commissioner of Internal Revenue (R. 39).

Neither could the Government be liable for further payment to the individuals. Payment to appellant and payment by appellant to the individuals would undoubtedly estop any individual from asserting a further claim for said taxes. Also the time within which claims could be filed by the individuals has expired (Section 322 Internal Revenue Code). Neither the Commissioner of Internal Revenue nor appellee has suggested at any time during the proceedings in this case that any claims for refund have been filed by the individuals for the taxes here involved.

Appellant submits that the purpose of Section 143(f) has been fully satisfied so that even if that section were applicable to this action, it would not prohibit or restrict appellant's right to recover.

So far as appellant has been able to discover, this action is the first to present the issues here involved. Similar issues, however, were considered in

*Houston Street Corporation v. Commissioner*, (CCA-5, 1936), 84 F. (2d) 821;

*Pauker v. U. S.* (D. C. N. Y. 1938), 23 F. Supp. 821;

*Capital Estates, Inc. v. Commissioner* (1942), 46 BTA 986.

In *Houston Street Corporation v. Commissioner*, (supra), the Court held that a withholding agent was a taxpayer and that the Board of Tax Appeals had jurisdiction to hear a petition of a withholding agent from a proposal to assess additional taxes.

In *Pauker v. U. S.,* (supra), the Court held that a withholding agent could not recover in an action against the United States for taxes erroneously withheld and paid to the Government. If the decision in that case is sound it is distinguishable from the present case in that the action was against the United States and not against the Collector, it did not appear that the withholding agent had committed itself to pay over the sums recovered to the individuals involved, and it did not appear that the Government was protected against further recovery by the individuals.

In *Capital Estates, Inc. v. Commissioner,* (supra), the Board held that it could not order the credit of an overpayment of taxes withheld against additional taxes due from the withholding agent upon its own income. Credits ordered by the Board are made under authority of Section 322, so Section 143(f) was directly applicable. Furthermore, the withholding agent sought credit against its own liability and it had not committed itself to reimburse the individuals from whom the tax had been withheld.

It is respectfully submitted that neither *Pauker v. U. S.* supra, nor *Capital Estates, Inc. v. Commissioner* is inconsistent with appellant's contentions herein and neither of said cases supports the conclusion of the Court below.

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**CONCLUSION.**

In conclusion appellant submits that it is the proper party to recover the taxes here involved; that

on the facts admitted by the parties and found by the Court below appellant is entitled to judgment against appellee; that the Court below committed error in concluding that appellant was not the proper party to maintain this action and could not recover against appellee. It is further submitted that the decision and judgment of the Court below was erroneous and should be reversed with directions to enter judgment for appellant on the first and second causes of action herein.

Dated, San Francisco,
May 7, 1943.

GEORGE H. KOSTER,
BAYLEY KOHLMEIER,
*Attorneys for Appellant.*

**(Appendix Follows.)**

# Appendix.

## Appendix

Section 143 of the Revenue Act of 1938, and Section 143 of the Internal Revenue Code (1939):

SEC. 143. WITHHOLDING OF TAX AT SOURCE.

(a) Tax-free covenant bonds.— * * *

(b) Nonresident aliens.—All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the United States, having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein), dividends, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income (but only to the extent that any of the above items constitutes gross income from sources within the United States), of any nonresident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein and composed in whole or in part of nonresident aliens, shall (except in the cases provided for in subsection (a) of this section and except as otherwise provided in regulations prescribed by the Commissioner under section 215) deduct and withhold from such annual or periodical gains, profits, and income a tax equal to 10 per centum thereof, except that such rate shall be reduced, in the case of a nonresident alien in-

dividual a resident of a contiguous country, to such rate (not less than 5 per centum) as may be provided by treaty with such country: PROVIDED, that no such deduction or withholding shall be required in the case of dividends paid by a foreign corporation unless (1) such corporation is engaged in trade or business within the United States or has an office or place of business therein, and (2) more than 85 per centum of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends (or for such part of such period as the corporation has been in existence) was derived from sources within the United States as determined under the provisions of section 119: PROVIDED FURTHER, That the Commissioner may authorize such tax to be deducted and withheld from the interest upon any securities the owners of which are not known to the withholding agent. Under regulations prescribed by the Commissioner, with the approval of the Secretary, there may be exempted from such deduction and withholding the compensation for personal services of nonresident alien individuals who enter and leave the United States at frequent intervals.

(c) Return and payment.—Every person required to deduct and withhold any tax under this section shall make return thereof on or before March 15 of each year and shall on or before June 15, in lieu of the time prescribed in section 56, pay the tax to the official of the United States Government authorized to receive it. Every such person is hereby made liable for such tax and is hereby indemnified against the claims and de-

mands of any person for the amount of any payments made in accordance with the provisions of this section.

(d) Income of recipient.—Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

(e) Tax paid by recipient.—If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be re-collected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

(f) Refunds and credits.—Where there has been an overpayment of tax under this section any refund or credit made under the provisions of section 322 shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent.

SEC. 322. REFUNDS AND CREDITS.

(a) Authorization.—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) Limitation on Allowance.—

(1) Period of Limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) Limit on Amount of Credit or Refund. —The amount of the credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or, if no claim was filed, then during the three years immediately preceding the allowance of the credit or refund.

(c) Effect of Petition to Board.—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) Overpayment Found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that such portion was paid (1) within three years before the filing of the claim or the filing of the petition, whichever is earlier, or (2) after the mailing of the notice of deficiency.

(e) Tax Withheld at Source.—

For refund or credit in case of excessive withholding at the source, see section 143(f).